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FILED

JUN 23 2003

**SECRETARY, BOARD OF
OIL, GAS & MINING**

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

**IN THE MATTER OF THE PETITION
BY THE DIVISION OF OIL, GAS AND
MINING FOR AN ORDER THAT DAN
POWELL, AND EMERY INDUSTRIAL
RESOURCES, INC. CEASE MINING
AND BE ORDERED TO BEGIN
IMMEDIATE RECLAMATION OF
THE CHERRY HILL PARK MINE,
UTAH COUNTY, UTAH,**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

Docket No. 2003-004

Cause No. M/049/021

This cause came before the Board Oil, Gas and Mining ("the "Board") on Wednesday, May 28, 2003, at 10:00 a.m. in the Hearing Room at the Utah Department of Natural Resources located at 1594 West North Temple Street, Salt Lake City, Utah.

The following Board members were present and participated in the hearing of this matter:

W. Allan Mashburn, Chairman
Robert J. Bayer
Stephanie Cartwright
Douglas E. Johnson
Samuel Quigley
J. James Peacock
Kent R. Petersen

Respondent Dan Powell, a natural person, represented himself. Mr. Powell testified on his own behalf.

As described below, Respondent Emery Industrial Resources, Inc. is a corporate entity and was unrepresented.

The Division of Oil, Gas and Mining (Division) was represented by Steven Alder, Assistant Attorney General. Messrs. Wayne Hedberg, Lynn Kunzler, and Doug Jensen, testified on behalf of the Division.

The Board was advised by Kurt E. Seel, Assistant Attorney General.

At the close of oral argument, the Board deliberated to discuss the matter, to vote, and then returned to the hearing room to announce its decision.

NOW THEREFORE, the Board, having fully considered the Respondents' oral argument; the written briefs, arguments, and memoranda of the Division; the record in this matter; and being fully advised, the Board voted unanimously to make and enter its Findings of Fact, Conclusions of Law, and Order, as follows:

FINDINGS OF FACT

1. Notice of the Request for Agency Action, and of the hearing, was duly served on Respondents and duly published as required by UTAH ADMINISTRATIVE CODE R641-106-100.
2. Emery Industrial Resources, Inc. (EIR) is a corporation incorporated under the laws of the State of Utah.
3. EIR is not a "natural" person as that term is utilized in UTAH ADMINISTRATIVE CODE R641-102-100.
4. Mr. Dan Powell is not an attorney authorized to practice law in the State of Utah.
5. On July 8, 1992, Dan L. Powell, d/b/a Emery Industrial Resources, filed a Notice of Intention to Commence Small Mine Operations for an area known as the Cherry Hill Park Mine, located in Utah County, Utah, and generally described by Division permit no. M/049/021.

6. Emery Industrial Resources, Inc. was incorporated in December 22, 1992.
7. On July 27, 1994, an inspection of the Cherry Hill Park Mine by the Division revealed that the area disturbed by mining operations had exceeded the 5-acre limit for a small mining operation.
8. The Division received an original Notice of Intention to Commence Large Mining Operations on November 14, 1994, filed by Dan L. Powell, as an authorized representative and agent for EIR.
9. Between November 14, 1994 and March 3, 1999, the mine operator continued mining operations at the Cherry Hill Park Mine, and the Division negotiated with Respondents to complete deficiencies in EIR's Large Mine Notice of Intention.
10. Respondents Powell and EIR submitted a revised Notice of Intention to Commence Large Mining Operations on March 3, 1999.
11. One March 12, 2002, the Division had a meeting with the Respondents to discuss the status of the mining operation and their response to the outstanding technical deficiencies. The Respondents agreed to provide a formal response to the Division no later than March 22, 2002.
12. On May 14, 2002, the Division issued a Notice of Non-Compliance to the Respondents, via certified mail and facsimile, ordering suspension of operations, posting of a reclamation surety in the amount of \$43,500.00, and submitting a response to the remaining permit deficiencies.

13. On January 9, 2003, the Division issued a proposed Agency Action to the Respondents, and had the Action served via personal service on January 14, 2003, by the Utah County Sheriff.

14. On January 28, 2003, an Informal Conference was held between the Division and the Respondents to discuss the January 9, 2003 proposed Agency Action.

15. On February 20, 2003, the Division Director sent to the Respondents his written Findings of Fact, Conclusions of Law & Order in response to the January 28, 2003 Informal Conference. The Order required: 1) Respondents to immediately cease all mining operations until written approval has been received from DOGM; 2) DOGM to inspect and file written report on disturbances within 10 days; 3) if within 30 days EIR has not provided acceptable form and amount of surety, DOGM will initiate an agency action before the Board asking for immediate reclamation and payment of civil penalties. The Respondents received this letter on February 26, 2003.

16. Pursuant to the Respondents' March 19, 2003 phone request for an extension of time, on March 20, 2003 the Division extended the Respondents' deadline to submit the reclamation surety to April 3, 2003.

17. As early as November 1994, the Respondents were advised of the statutory requirement that they would need to submit an adequate mining reclamation bond prior to final approval of the Large Mine Operation Notice of Intent.

18. On June 28, 2002, Respondent EIR was given its first formal written demand to post a surety in the amount of \$43,500.00, and since that date Respondents have failed to post the required surety.

19. The Division has provided numerous extensions of time to obtain the required surety including two extensions since the Informal Conference held Jan 28, 2003.

20. Most or all of the materials mined at the Cherry Hill Park Mine consisted of consolidated limestone, the extraction of which required physical breaking of the rock.

21. The Disturbed Area at the Cherry Hill Park Mine is currently 19 acres, more or less.

22. The testimony by Division staff concerning the estimates of the disturbed area and reclamation costs, demonstrate that these estimates were prepared in a professional and competent manner and reflect standard engineering practices in the mining and reclamation industry.

CONCLUSIONS OF LAW

1. Jurisdiction over this matter is conferred upon the Board of Oil, Gas and Mining ("Board") by UTAH CODE ANNOTATED §40-8-6(2) (2002) which empowers the Board "to hold hearings and to issue orders" as may be necessary to enforce the provisions of the Act.

2. UTAH CODE ANNOTATED §40-8-16(3)(2002) provides that a Notice of Intention may not be withdrawn until the operator is provided an opportunity for a hearing before the Board.

3. UTAH CODE ANNOTATED §40-8-9(5)(a) provides for a public hearing before the Board, for any notice of violation or order of cessation of mining operations.

4. UTAH ADMINISTRATIVE CODE R641-102 requires that all entities whom are not natural persons be represented by attorneys.

5. Because there are insufficient reasons to deviate from the requirements of UTAH ADMINISTRATIVE CODE R641-102, nor did the Respondent move the Board to deviate from its procedural rules, Mr. Powell may not represent EIR in this matter.

6. Under Board regulation UTAH ADMINISTRATIVE CODE R641-102-100, Respondent Dan Powell may represent himself in this matter.

7. UTAH ADMINISTRATIVE CODE § R647-1-106 defines “gravel” and “sand” as “unconsolidated” materials deposited by sedimentary processes.

8. The materials mined at the Cherry Hill Park Mine were not sand, gravel, or rock aggregate as those terms are defined by the Regulations.

9. UTAH CODE ANNOTATED §40-8-16(2)(b)(2002) provides for denial of the large mine permit application, and the withdrawal of the existing small mining permit, for failure to post adequate reclamation surety.

10. As of July 27, 1994, the Cherry Hill Park Mine was a Large Mining Operation subject to the requirements of UTAH ADMINISTRATIVE CODE § R647-4.

11. The Respondents, EIR and Dan Powell, violated UTAH CODE §40-8-13(1)(a)(2002), UTAH CODE §40-8-14(1)(2002) (posting a surety in an amount as determined necessary by the Division prior to beginning mining as a large mining operation) and UTAH ADMINISTRATIVE CODE § R647-3-113.

ORDER

A. Respondents’ Notice of Intention of Commence Small Mine Operations, M/049/032 is ordered withdrawn.

B. Respondents are ordered to cease any and all mining operations at the Cherry Hill Park Mine.

C. Respondents Dan Powell and Emery Industrial Resources, Inc. have sixty (60) days from the date of the Board's May 2003 hearing (May ²⁸~~25~~, 2003) to submit to the Division a mine reclamation surety in the amount of \$43,500, and in a form which is acceptable to the Division. If a Division approved surety in the amount of \$43,500.00 is timely submitted, the Respondents' Notice of Intent to Commence a Large Mining Operation is approved.

D. If Respondents fail to submit a Division acceptable mine reclamation surety within sixty days, the Board grants all additional relief requested by the Division in paragraphs A., B., C. and D. of the Prayer for Relief section of the Division's April 10, 2003 Notice of Agency Action in this matter. If Respondents fail to submit a surety which is satisfactory to the Division in compliance with paragraph "A" above, the additional relief sought by the Division shall automatically take effect and by this paragraph is so ordered. In summary, but not modifying the relief requested by the Division in paragraphs A - D of its Prayer, the Division has requested that Respondents be ordered to commence and diligently complete reclamation, that the Division be authorized to complete the reclamation and to seek recovery of all reclamation costs and expenses from the Respondents.

E. Notice re Right to Seek Judicial Review by the Utah Supreme Court or to Request Board Reconsideration: As required by UTAH CODE ANN. § 63-46b-10(e) and - 10(g), the Board hereby notifies all parties in interest that they have the right to seek judicial review of this final Board Order in this formal adjudication by filing a timely appeal with the Utah Supreme Court within 30 days after the date that this Order issued. UTAH CODE ANN. § 63-46b-14(3)(a) and -

16. As an alternative to seeking immediate judicial review, and not as a prerequisite to seeking judicial review, the Board also hereby notifies parties that they may elect to request that the Board reconsider this Order, which constitutes a final agency action of the Board. UTAH CODE ANN. § 63-46b-13, entitled, "Agency review - Reconsideration," states:

1(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Id. The Board also hereby notifies the parties that UTAH ADMINISTRATIVE CODE R641-110-100, which is part of a group of Board rules entitled, "Rehearing and Modification of Existing Orders," states:

Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

Id. See UTAH ADMINISTRATIVE CODE R641-110-200 for the required contents of a petition for rehearing. If there is any conflict between the deadline in UTAH CODE ANN. § 63-46b-13 and the deadline in UTAH ADMINISTRATIVE CODE R641-110-100 for moving to rehear this matter, the Board hereby rules that the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the party may still seek judicial review of the Order by perfecting a timely appeal with the Utah Supreme Court within 30 days thereafter.

F. The Board retains continuing jurisdiction over all the parties and over the subject matter of this Cause, except to the extent said jurisdiction may be divested by the filing of a timely appeal to seek judicial review of this Order by the Utah Supreme Court.

G. For all purposes, the Chairman's signature on a faxed copy of this Order shall be deemed the equivalent of a signed original.

SO ORDERED this 23 day of June, 2003.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

By W. Allan Mashburn
W. Allan Mashburn, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** for Docket No. 2003-004, Cause No. M/049/021 to be mailed with postage prepaid, this 24 day of June, 2003, to the following:

CERTIFIED MAIL

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